IN THE

Supreme Court of the United States

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] is a national voluntary bar association whose approximately 65,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm as the result of tortious misconduct.

Justice in America is administered, in large part, by the American people themselves. The jury is a distinctively democratic institution, reflecting the common sense and conscience of the community, beholden to no personal

ambition, economic interest, or political constituency. The value of the independent jury is reflected in the array of special interests which have mounted an intense and heavily financed campaign to undermine its role under the guise of "tort reform." The heart of the challenge to punitive damages in this case is an attack on the jury.

ATLA therefore respectfully submits this brief as amicus curiae. The written consents of both parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

In this case, the Court is once again invited into the heated controversy surrounding punitive damage awards in civil lawsuits. Those facing liability have mounted a well-orchestrated and lavishly financed campaign which has urged nearly every state legislature to impose limits on this common-law remedy. Having met with limited success, the tort reform lobby now calls upon this Court to impose such limits as a matter of due process.

The central issue is clear and relatively narrow: May the states continue to employ the common-law rule that the amount of punitive damages is to be determined by the jury, within the proper exercise of its discretion and based on the evidence in the particular case. Or must each state establish either predetermined limits on damages or procedures more favorable to defendants than those already afforded in civil actions.

The focus of attack is the very cornerstone of our civil justice system: the jury. In a peculiar inversion of the familiar values this Court has associated with the Fourteenth Amendment, the most powerful interests in society seek relief from "oppression" -- not by government, but by the institution which the common law has devised as a check against the power of government.

Amicus suggests that the common law is not amenable to the due process analysis applied to statutes, regulations,

or administrative actions. Common-law procedures or remedies which have been widely adopted and followed by the states over an extended period of time, may generally be deemed consistent with the traditional notions of fairness preserved by the Due Process Clause.

Even under the due process analysis generally applied to positive enactments, the common-law rule followed by the Alabama court passes constitutional muster. Reliance upon jury discretion, within appropriate judicial controls, is rationally related to the legitimate state interest in punishing and deterring violations of substantive tort law. Moreover, since the property interest at stake and the risk of error are not significantly greater than those involved in jury assessment of compensatory damages, procedural due process does not demand additional safeguards beyond the considerable protection afforded defendants in private civil actions.

Finally, empirical evidence contradicts the tort reformers' arguments that large awards are the result of jury bias or sympathy and that they undermine the competitiveness of American industry. There is no "explosion" in the frequency and size of punitive damage awards, especially in personal injury and product liability suits. Additionally, punitive awards neither deter innovation nor place American businesses at a competitive disadvantage with foreign companies.

ARGUMENT

I. JURY DISCRETION IN ASSESSING PUNITIVE DAMAGES, HISTORICALLY RECOGNIZED AT COMMON LAW, WIDELY ADOPTED AND LONG APPLIED BY AMERICAN COURTS, AND CONSISTENTLY ACKNOWLEDGED BY THIS COURT, COMPORTS WITH DUE PROCESS.

A. The Tort Reform Proposals to Limit Punitive Damages Have Been Fully Presented to State Legislatures.

The central issue in this case is clear and relatively narrow. Neither the constitutionality of punitive damages nor the state's wisdom in allowing punitive damages in a particular cause of action is before the Court. Rather, Petitioner Pacific Mutual attacks the means the state has chosen for determining the amount of damages.

The Alabama court adhered to the common law rule followed in the great majority of states: Where recovery of punitive damages is permitted under state law and supported by the evidence in the case, it is the responsibility of the jury, based upon the evidence and in the proper exercise of its discretion, to determine the amount of damages appropriate to punish and deter defendant's misconduct. *See* Restatement (Second) of Torts § 908(2)(1979). Pacific Mutual argues that this rule leaves the jury "free to punish selectively and arbitrarily and to give free reign to bias, prejudice and wealth distribution inclinations." Brief of Petitioner at 10. Due process requires states to restrict jury discretion by setting a predetermined "range of permissible punishment," *id.* at 26, and imposing heightened procedural safeguards. *Id.* at 37-40.

Does the common law rule place too much power in the hands of jurors? Legislators might reasonably differ. Indeed many of the amici who appear in support of Pacific Mutual in this case are major participants in the tort reform lobby which has placed its proposed limitations on punitive damages before nearly every state legislature during the past five years.[1] As result of this well-

[1]For example, the American Tort Reform Association, Association for California Tort Reform, Chamber of Commerce of the United States, Defense Research Institute, National Association of Manufacturers, Pharmaceutical Manufacturers Association, and Product Liability Alliance.

orchestrated and lavishly financed lobbying effort,[2] about 22 states have enacted some elements of the tort reformers' punitive damages agenda. However, only nine have imposed limits on the amounts of punitive awards. *See* American Tort Reform Association, Tort Reform Accomplishments, 1986-1989 18-20 (1989).[3] The tort reform lobby now asks this Court to impose tort reform upon the states as a constitutional imperative. The relief sought, as one amicus bluntly states, is for "this Court to require state legislatures to specify when punitive damages are permissible and in what amounts." Brief of Amicus Curiae Defense Research Institute at 13.

ATLA respectfully suggests that deference to legislative judgments extends not only to those states which have enacted tort reforms, but also to the larger number which have preserved the common law remedy of punitive damages.

[2]The anxiety-laden rhetoric of the tort reformers' intensely politicized campaign has been compared to the recent marketing tactic known as "slice-of-death" advertising. "Consequently, the current debate over punitive damages has become not a matter of rational discourse, but one of public relations, propaganda, and the mobilization of prejudice and fear. Daniels and Martin, *Myth and Reality in Punitive Damages* 13 (American Bar Foundation Working Paper 1990), scheduled for publication at 75 Minn. L. Rev. ___ (Oct. 1990).

[3]The tort reform lobbying effort has been sharply criticized by scholars as an exercise in "raw interest group politics" employing "smokescreens and false alarms," Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988); and "intentional misrepresentation." Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law,*, 24 Houston L. Rev. 81, 96 (1987). These allegations are of particular concern since those whose rights are "reformed" are, by definition, unknown future victims of tortious misconduct, and therefore politically powerless. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 Harv. J. on Legis. 143, 189 (1981).

B. Civil Remedies and Procedures Rooted in the Common Law and Developed by American Courts in the Light of Reason and Experience Generally Reflect the Principles of Fundamental Fairness Guaranteed by the Due Process Clause.

It is not often that this Court is called upon to rewrite state tort law. The relief sought in this case is all the more extraordinary in urging the Court to strike down a rule which was not created by statute, but is well-established principle of the common law." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). Pacific Mutual and various supporting amici ask this Court to pretend that the rule of jury discretion was established by Alabama's legislature. They proceed to find the rule wanting in substantive and procedural due process under the tests applied to statutes, administrative decisionmaking, and other governmental acts. ATLA suggests that this analysis is strained, at best, and unnecessary.

The common law and the constitutional guarantee of due process grow out of the same historical roots and share the capacity to adapt to society's evolving notions of justice. Every state (excepting Louisiana) adopted the common law of England as state law. *See Davidson v. City of New Orleans*, 96 U.S. 97 (1877). While criminal law was quickly codified in statute, much of tort law consists of common law, as developed by the courts in the light of reason and experience.

The Due Process Clause is not "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885). Nor does fundamental fairness depend upon the personal "predilections" of judges, or even Justices. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Instead, the Due Process Clause receives its meaning from "what history teaches are the traditions from which

[this country] developed as well as the traditions from which it broke." *Moore, supra*, at 502, quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In enshrining due process *of law* in the Constitution, the drafters plainly had in mind the set of remedies and procedures familiar to them at common law. Due process, as this Court has explained reflects this origin:

> To what principles, then, are we to resort to ascertain whether this process enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S.. (18 How.) 272, 276-77 (1856).

More recently, Justice Powell reemphasized this view that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). The Court there looked to the common law for the standard against which state action -- corporal punishment of school children -- should be measured. *Id.* at 675-76. Indeed, the Court indicated that lack of notice or hearing might well have violated due process but for the availability of the common-law tort remedy for excessive punishment. *Id.* at 674. This result is consistent "with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law." Id. at 679 n.47.

Few principles of the common law are as firmly

rooted and widely embraced in America as the broad discretion of juries to make factual determinations in civil cases. It is an "essential characteristic" of the federal system under the influence -- if not the command -- of the Seventh Amendment. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958). This Court has held that the Seventh Amendment specifically protects the right to have a jury assess damages, adding:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953).

The notion that remedies and procedures developed and applied by the common law courts may themselves be inimical "to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968), is anomalous. What shall be the measure of fundamental fairness if not the common law?[4] Cut loose from its historical moorings, the Due Process Clause would indeed reflect only the private notions of judges or Justices. This Court has warned that "As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

[4]This is not to say that elements of the common law cannot be modified by legislation. However, "The common law has nonetheless served as a valuable tool in elucidating the meaning of liberty, and its insights should be preserved as suggestive, if not authoritative for constitutional analysis." L. Tribe, American Constitutional Law 1311 (2d ed. 1988).

C. The Common Law Rule of Jury Discretion in Determining the Amount of Punitive Damages, Widely Adopted and Long Preserved by American Courts, Does Not Offend Fundamental Fairness.

The meaning of due process is not, of course, frozen in the mold of the common law of England. The common law itself is a living thing. American judges, primarily state court judges, continue to refine, modify, or reject the rules of the common law in the light of reason, experience, and contemporary notions of justice. ATLA suggests that the question of whether a common law remedy or procedure offends traditional principles of fundamental fairness can generally be answered by looking to the experience of the states, and the guidance of this Court, over the course of a significant period of time.[5]

This Court's experience has been that "Procedures in civil litigation long sanctioned by the passage of time and widely used throughout the United States are almost certain to satisfy the Supreme Court as being due proceedings at law, or due process of law." C. Antieau, 1 Modern Constitutional Law 541 (1969). The common-law principle which vests broad discretion in the jury to determine the amount of punitive damages based on the circumstances of the case is clearly within this standard.

The practice of awarding punitive damages was, of course, well recognized at common law prior to the drafting of the Constitution. *Browning-Ferris Indus. v. Kelco Disposal Inc.*, 109 S. Ct. 2909, 2919 (1989). The principle of jury discretion was an integral part of this remedy from its very inception. *Id.* at 2920 n.20, quoting Lord Camden's

[5]A useful parallel is found in the incorporation of specific constitutional guarantees into the Fourteenth Amendment. On whether a specific constitutional procedure is required by due process, the Court has given great weight to its prevalence among the states. *See Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961); *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968).

upholding "exemplary damages" based on the jury's discretion in determining the amount of damages in tort actions in *Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763). *See* L. Schlueter & K. Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

The common-law rule was widely adopted by American courts. Prior to the Fourteenth Amendment, this Court recognized that punitive damages were "a well established principle of the common law" in which the determination of the amount "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth,* 54 U.S. (13 How.) 363, 371 (1851). The Court later noted that the common-law remedy of punitive damages was widely accepted by the states, and that "nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds,* 116 U.S. 550, 565 (1886). Presently at least forty-five states continue to permit juries to assess punitive damages in appropriate circumstances. L. Schlueter & K. Redden, Punitive Damages § 18.1(A) (2d ed. 1989).

Not only has this Court recognized that punitive damages "have long been a part of traditional state tort law," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)(upholding a $10 million punitive damage award), the Court has viewed punitive damages, including the discretion accorded to juries, as an important remedy in furthering federal interests. The Court explained in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), that by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." *See also Carlson v. Green*, 446 U.S. 14, 22 n.9

(1980)("punitive damages may be the only significant remedy available in some §1983 actions where constitutional rights are violated but the victim cannot prove compensable injury.").

ATLA submits that a common law rule which has enjoyed such wide acceptance and longstanding application is entitled to "a powerful presumption" of fundamental fairness *Rivera v. Minnich*, 107 S. Ct. 3001, 3003 (1987).[6]

It is possible that, following a dramatic change in circumstances or social values, what once conformed to notions of fairness may be seen to offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner,* 433 U.S. 186, 212 (1977). Such a case is not before this Court. The evil Pacific Mutual complains of, the possibility of arbitrary verdicts, has been a characteristic of the rule of jury discretion since its inception. Moreover, there is no indication that society's notions of justice have so changed that entrusting important matters to juries is viewed as intolerable. Indeed this Court has recently stated, in a case involving the death penalty:

> the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'

McKlesky v. Kemp, 481 U.S. 279, 331 (1987).

ATLA urges this Court to hold that the Alabama rule permitting juries to determine the amount of punitive damages conforms to such a widely adopted and long practiced common law rule that it does not offend the Due

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[6]Or, as Justice Holmes remarked, "if a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Process Clause.

To hold otherwise would drastically change the nature and scope of this Court's judicial intervention under the auspices of due process. Much of state tort law is a large and intricate tapestry woven by the orderly process by which the courts adapt, extend, and refine the time honored principles inherited from generations past. To commence unraveling the rules governing punitive damages provides no stopping point. Should due process restrict a jury's discretion in assessing noneconomic damages, pain and suffering, or emotional distress? Nor, having taken the first step, is there any principled basis for this Court to deny due process scrutiny of strict products liability, the informed consent doctrine, or other common-law rules.

This Court has consistently "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Daniels v. Williams*, 474 U.S. 327, 332 (1986), quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976). It is a door which should remain shut.

D. The Common Law Standards for Punitive Damages are Not Impermissibly Vague Under the Due Process Clause.

The crucial distinction between common law rules and positive enactments also resolves Pacific Mutual's claim that the standards for awarding punitive damages are unconstitutionally vague. Provisions of the common law, almost by definition, acquire commonly accepted meaning through application by the courts. Consequently, courts have unanimously held that case law provides sufficient notice to tortfeasors and standards for juries as to what conduct will result in punitive damages and the level of potential liability. *See, e.g., Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1365-66 (5th Cir. 1989); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465 (D. Hawaii 1989). The void-for-vagueness doctrine does not require that the precise amount of a punitive damage award be known prior

to trial. *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1971).

E. Jury Verdicts are Not Subject to Due Process Review.

Pacific Mutual argues that, apart from the rules governing punitive damage awards generally, the verdict itself violated its "due process right to be free of grossly excessive, disproportionate damage awards." Brief of Petitioner at 32. Pacific Mutual submits that punitive awards must satisfy not only the common law test of excessiveness, but must also be proportional to criminal fines for similar misconduct. *Id.* at 34-35.

This argument is clearly precluded by the Court's decision in *Browning-Ferris, Indus. v. Kelco,* 109 S. Ct. 2909 (1989). Part IV of the majority opinion, in which all members of the Court concurred, states:

> In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

109 S. Ct. at 2922. Indeed, this Court rejected, even as a matter of federal common law, a standard of excessiveness which "would require us to ignore the distinction between the state and federal law issues," *id.*, "or to take steps which ultimately might interfere with the proper role of the jury." *Id.* at 2923 n.26.

ATLA suggests that these imperatives apply with even greater force against imposing such a standard upon state courts.

II. JURY DISCRETION TO ASSESS DAMAGES TO PUNISH AND DETER MISCONDUCT WITHOUT PREDETERMINED LIMITS DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Even if this Court accepts the premise that a common law remedy is subject to the same due process analysis applied to statutes, regulations or other governmental decisionmaking, ATLA suggests that jury discretion clearly passes constitutional muster.

A. Jury Discretion to Assess Punitive Damages Based on the Facts and Circumstances of the Individual Case is Rationally Related to State Interest in Punishing and Deterring Culpable Violations of Substantive Tort Law.

Pacific Mutual contends that the rule of jury discretion in assessing punitive damages is fundamentally unfair for two reasons: First, "arbitrary, selective punishment, at the whim of the particular jury or court, becomes the rule, giving free reign to bias and prejudice," and, second, "No fair warning is given of the amount of punishment." Brief of Petitioner at 24. To eliminate these evils of arbitrariness and unpredictability, due process demands that states, preferably state legislatures, "set the range of permitted punishment by way of punitive damages prior to the acts involved." Id. at 26.

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The "rational basis" standard is broadly deferential to the states, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); economic regulation will be upheld if any set of facts known or reasonably inferable supports it. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). As noted earlier, the great majority of states preserve the common-law rule which calls upon the jury to assess punitive damages based on the facts and circumstances of the individual case. ATLA submits that this decision is not

irrational.

A claim for punitive damages is not an independent cause of action. It is merely an additional remedy to punish and deter particularly culpable violations of the state's substantive law of torts.

The purpose of that body of law is to protect the health, property, economic rights and civil rights of citizens not only by compensating those whose rights are invaded, but also by punishing and deterring misconduct. This is the very basis of the "fault" principle in tort law. Deterrence is a "strong thread running through tort law." Report to the American Bar Association by the Special Committee on the Tort Liability System, Towards a Jurisprudence of Injury 4-3 (1984). In addition, "the role that punishment actually plays in tort law . . . provides a mediate useful outlet for the community sense of justice." *Id.* at 4-172. *See also* Cooter, *Economic Analysis of Punitive Damages,* 56 So. Cal. L. Rev. 79, 137 (1982)("there is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers."); Morris, *Punitive Damages in Tort Cases*, 46 Harv. L. Rev. 1173, 1177 (1931)(punitive damages merely increase the severity of the "admonitory" function of compensatory damages). Product liability, for example, seeks not only to compensate victims, but to keep unreasonably dangerous products off the market in the first place. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 826 (1973).

Compensatory damages alone are not adequate to achieve this goal, particularly where the misconduct is intentional or willful. Actual damages have no relation to the reprehensibility of misconduct. One who drives drunkenly into a crowd of school children might, happily, inflict only a minor injury. Nor do compensatory damages effectively deter violations of constitutional rights which, though valuable, do not entail great monetary consequences. *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980)(in such cases, "punitive damages may be the only

significant remedy). In other situations, such as fraud and bad faith, a defendant may view the misconduct as profitable due to the low probability of getting caught. *See, e.g., Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 271 (Miss. 1985). In the area of product liability:

> Compensatory damages are often foreseeable as to amount . . . . Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.

Fischer v. Johns-Manville Corp., 103 N.J. 643, 664, 512 A.2d 466, 477 (1986). A classic example is the Ford Pinto. An internal memo predicted that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the hazard could be eliminated for less than $11 per car, Ford management nevertheless determined that it was more profitable to pay damages than to fix the car. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981).[7] *See also, Ford Motor Co. v. Durrill*, 714 S.W. 329 (Tex. Ct. App. 1986).

In other words, predictable damages may cease to deter and become, in effect, the purchase price for a license to kill.

Nor do criminal penalties provide the necessary punishment and deterrence. As this Court has noted, criminal fines are "often calculated without regard to the harm the defendant has caused," and may lack "precise

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[7]Portions of the Ford internal memo referred to, "Fatalities Associated With Crash-Induced Fuel Leakage and Fires," are reprinted in Keeton, Owen, and Montgomery, Cases and Materials on Product Liability and Safety 490-91 (1980).

deterrent effect." *Kelly v. Robinson*, 107 S Ct. 353, 362 n.10 (1987). Illustrative again is *Grimshaw*. Ford argued that punitive damages in the case, involving the burning death of one occupant and severe disfigurement of the other, should be limited to the $50 and $100 fines for violation of the Vehicle Code. The court responded:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

Clearly, ATLA submits, the jury's ability to fix the amount of punishment and deterrence based on the circumstances advances the goals of tort law.

B. Jury Discretion is No Vice

The disturbing premise of Pacific Mutual's argument is that juries commonly disregard their oaths and instructions and impose punitive damages based on bias and prejudice. Brief of Petitioner at 24. This indictment is leveled against the American people, a cross-section of whom sit on juries daily across the country. Into the hands of jurors we place the fates of the poor and the powerful. Our reliance on their common sense as well as their sense of the conscience of the community, extends even to ultimate decisions of life and death. *Witherspoon v. Illinois*,

391 U.S. 510, 518 (1968).

It is precisely this virtue of juries -- their reflection of the collective morality of the community -- that the law of punitive damages draws upon. Punitive damages, this Court has recognized, represent the community's condemnation of "reprehensible conduct." *IBEW v. Foust*, 442 U.S. 42, 48 (1979). As the conscience of the community, "The jury may also be the best judge of what amount is necessary to readjust the status of the parties." Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 Ala. L. Rev. 1079, 1111 (1989).

How wisely do juries exercise this discretion? The largest empirical study of actual jury performance, sponsored by the Roscoe Pound Foundation, found that:

> Juries overwhelmingly take their duties seriously . . . Juries are evidence-oriented . . . with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them . . . Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases. . . The evidence also strongly suggests that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy.

J. Guinther, The Jury in America 102 (1988). Guinther concludes that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of research method, has reached that conclusion." *Id.* at 230. *Cf., Duncan v. Louisiana*, 391 U.S. 145, 157 (1968)("the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them," citing H. Kalven and H. Zeisel, The American Jury (1966).

ATLA suggests that the decision of Alabama and

other states to allow juries to assess punitive damages without a predetermined limit can scarcely be viewed as irrational.

C. Predictability is No Virtue.

Nor does the lack of precise predictability of the amount of punitive awards render state's reliance on jury discretion irrational. The fact is that "the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine." *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985). For a company faced with a business decision of willfully pursuing a course of conduct which is unlawful but profitable, "If punitive damages are predictably certain, they become just another item in the cost of doing business," *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984). "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989), passing along the cost to the very consumers who are endangered!

Making punitive damages awards predictable eviscerates their effectiveness as a deterrent. Due process surely does not require states to, in effect, immunize intentional wrongdoing upon payment of a user fee.

Finally, it is not immediately apparent that the proposed limits are themselves rationally related to eliminating the perceived evils of jury arbitrariness and unpredictability.[8] A limit on the amount of awards, either

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[8]If a limit on punitive damages were indeed essential to due process, this Court might reasonably expect a measure of specificity and agreement on the part of proponents. However, Pacific Mutual asks only for some "upper limit," presumably less than the verdict in this case. The proposals of supporting amici are either hopelessly vague, *see, e.g.*, Brief of The Business Roundtable at 14-15; Brief of Alliance of American Insurers at 23-24. Or they are plainly self-serving, designed to secure the

in absolute terms or as a ratio to compensatory damages, protects against large, but not arbitrary verdicts. Nor are punitive damage awards likely to become highly predictable, since each state legislature is presumably free to establish its own range or ratio.

III. EXISTING PROCEDURES FOR ASSESSING PUNITIVE DAMAGES SATISFY PROCEDURAL DUE PROCESS.

While private parties in civil suits are unquestionably entitled to due process, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), this Court has held only that the Fourteenth Amendment requires the basic elements of notice and a meaningful opportunity to be heard. *Id.* at 429; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In this case, Pacific Mutual was accorded a full adversary trial on the merits, surrounded by the procedural protections contained in the rules of evidence and civil procedure and judicial review.

Nevertheless, Pacific Mutual argues that these procedures allow juries to assess punitive damages based on their bias, prejudices, or "wealth distribution tendencies." Brief of Petitioner at 17. It contends that defendants facing claims for punitive damages should be entitled to the procedural protections afforded criminal defendants, including proof beyond a reasonable doubt, unanimous jury verdicts, an upper limit on punishment, and separation of liability and punitive damages issues, under this Court's formulation:

> [I]dentification of the specific dictates of due process generally required consideration of three distinct

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advantage for special interests. For example, City of New York views a ratio between punitive and compensatory damages as "an indispensable standard," at 13, while Arthur Andersen & Co. argues as vehemently that such a ratio would produce "unconstitutionally excessive" awards. At 26.

> factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Pacific Mutual apparently concedes that the procedures surrounding compensatory awards satisfy the Due Process Clause. ATLA respectfully submits that none of the *Mathews* factors mandate heightened protection when a claim for punitive damages is asserted.

A. The Interest Affected.

Of crucial significance is the fact that the interest which would be affected by an erroneous decision is, constitutionally speaking, slight. In applying the *Mathews* analysis, this Court has dealt with a spectrum of private interests. Appropriately, the greatest weight is accorded to the loss of physical liberty. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). Property interests, particularly "mere loss of money," *Addington v. Texas*, 441 U.S. 418, 425 (1979), are far less substantial.

Another consideration which this Court has found highly relevant under the first *Mathews* factor is whether the proceeding "pits the State directly against" the party. *Santosky*, *supra*, at 760. A proceeding where the government "marshals an array of public resources to prove its case," may require heightened procedural protections. *Id.* at 761. But "the typical case involving a monetary dispute between private parties" lies at the "end of the spectrum." *Addington*, *supra*, at 423. This Court has pointed out that "while private parties may be interested

intensely in a civil dispute over money damages," society has "minimal concern with the outcome." *Santosky, supra,* at 756. *See also In re Winship*, 397 U.S. 358, 371 (1970)(Harlan concurring)(" In civil cases: we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.")

Pacific Mutual and amici expend considerable effort arguing that punitive damages, like criminal penalties, are intended to punish and deter misconduct. However, as noted earlier, even compensatory damages in tort actions have a punishment and deterrence function. More to the point, as *Mathews* and subsequent cases make clear, it is the importance of the private interest and direct opposition by the government, not the purpose of the deprivation, which determines what process is due.[9]

ATLA submits that the interest of a defendant facing a claim of punitive damages in a private civil action is constitutionally indistinguishable from the defendant's interest in preventing an erroneous compensatory award.

B. Risk of Erroneous Deprivation.

Pacific Mutual argues that under the common law, "arbitrary, selective punishment, at the whim of the particular jury or court, becomes the rule, giving free reign to bias and prejudice." Brief of Petitioner at 24. Nowhere is there any substantiation that a significant number of punitive verdicts are not merely large, but improper. Moreover, the common law already affords safeguards

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[9] The purpose served by a penalty is, of course, relevant to the determination of whether an action brought by the government is civil or criminal. In actions between private parties, there is no such ambiguity. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963) is therefore inapposite. *Cf. United States v. Halper,* 109 S. Ct. 1892, 1902 (1989)(protection against double jeopardy inapplicable to actions by private parties seeking punitive damages).

against precisely this type of erroneous deprivation.

A feature of the common law of punitive damages is reliance upon judicial review to prevent excessive awards. See Restatement (Second) of Torts § 908 comment d (1979). Under the common law standard, a verdict may be overturned where it was "so excessive . . . as to demonstrate that the jury have acted against the rule of law, or have suffered their passions, their prejudices, or their perverse disregard for justice to mislead them." *Barry v. Edmunds,* 116 U.S. 550, 565 (1886). *See generally* L. Schlueter & K. Redden, Punitive Damages § 6.1B (2d ed. 1989). As one court states "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The specter of bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co. v. Day,* 594 P.2d 38, 48 (Alaska 1979).

Indeed, defendants enjoy greater protection against large punitive awards than against large compensatory awards. For example, although many states permit a judge to order a new trial on the basis of inadequate compensatory damages, virtually all accept the view that additur does not apply to punitive damages. Courts may reduce, but not increase the jury's award. *Louisville & Nashville R.R. v. Street*, 164 Ala. 155, 51 So. 306 (1909); *Wangen v. Ford* Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); *see* Note, 16 Cumberland L. Rev. 151, 158 (1985-86).

Another special protection is the well-settled rule that "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control v. Jenkins,* 409 So. 2d 1039, 1043 (Fla. 1982); *Olson v. Walker*, 781 P.2d 1015, 1021 (Ariz. App. 1989)(award "must not financially kill the defendant"); *Thiry v. Johns Manville Corp.*, 661 P.2d 515, 518 (Okla. 1985)(similar). Compensatory damages are not so limited.

The accusation that courts are unable or unwilling to

protect against excessive awards has no basis. One district judge recently remarked, "A large body of common law has developed and is developing through the reported case law and on computer research whereby meaningful standards of comparison are being created. Reviewing punitive damage awards under the special facts and circumstances of each case is really very little different than reviewing compensatory awards for intangible injuries." *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F. Supp. 87, 100 (N.D. Ill. 1988), revd' in part on other grounds, 877 F.2d 614 (7th Cir. 1989). If anything, "the court exercises much closer supervision over [punitive] awards than is the case with compensatory awards." *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). *Accord*, *Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934 (1990); *Deal v. Byford*, 127 Ill. 2d 192, 203, 130 Ill. Dec. 200, 205, 537 N.E.2d 267, 272 (1989).

Commentators have noted a trend toward increased judicial scrutiny of punitive damage verdicts. *See* Ghiardi, *Punitive Damage Awards: An Expanded Judicial Role*, 72 Marquette L Rev 33, 43 (1988); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 44 (1982). And empirical studies indicate that courts frequently reduce or reverse punitive verdicts where appropriate. See M. Peterson, S. Sarma, M, Shanley, Punitive Damages: Empirical Findings viii (RAND Institute for Civil Justice 1987). A study of product liability verdicts found that courts reduce punitive damages to a greater extent than compensatory awards. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States 47 (Sept. 1989). Where juries err, the GAO concluded, "The tort system . . . appears to be correcting these errors." Id.

ATLA submits that existing procedures, including effective judicial review, sufficiently minimize the risk of erroneous deprivation "in the generality of cases." *Walters*

v. National Ass'n of Radiation Survivors, 473 U.S. 305, 322 (1985).

It is also immediately apparent that the proposed procedures would have little probable value in reducing the alleged harms. Pacific Mutual has chosen to argue that juries are not merely mistaken, but perverse. While proof beyond a reasonable doubt and unanimous verdicts might enhance the accuracy of jury factfinding, such procedures would be unavailing if it is true that juries ignore their oaths that instructions and make arbitrary decisions on the basis of bias and prejudice. An upper limit on damages would protect against large, but not necessarily excessive or arbitrary verdicts.

C. Government Cost

Fiscal and administrative burdens resulting from adoption of these procedures are not insubstantial. Requiring proof beyond a reasonable doubt, for example, would likely result in more frequent appeals and fewer post-trial settlements. The requirement of a unanimous jury might be expected to increase the number of hung juries.

In addition, this Court might reasonably anticipate a steady stream of petitions to determine whether state procedures, particularly "upper limits" on awards, satisfy due process. In addition, other defendants may be expected to seek due process protections in cases involving damage awards for pain and suffering, emotional distress, or other noneconomic damages.

IV. THE FREQUENCY, SIZE, AND ECONOMIC IMPACT OF PUNITIVE DAMAGE AWARDS DO NOT WARRANT EXPANSION OF DUE PROCESS IN FAVOR OF WRONGDOERS.

A. There is no "Explosion" in Punitive Damage Awards.

The tort reform amici complain that punitive damages

are "skyrocketing," with "explosive" growth in the size and number of awards. *See, e.g.*, Briefs of ATRA at 17, Business Roundtable at 4, Chamber of Commerce at 9, Equal Employment Advisory Council at 6. An increase in punitive damage awards, ATLA suggests, might well signify an increase in justice in our courts.[10] However, with special emphasis on products liability cases, amici argue that the "explosion" in punitive damages proves that juries act upon bias against corporations or sympathy for individual plaintiffs. Additionally, the reformers argue that the increasing burden is eroding the ability of American business and industry to develop innovative products and compete in the world market. Recent empirical studies show that this "explosion" is little more than a myth.

The first was conducted by the Institute of Civil Justice at the Rand Corporation, which is funded primarily by business and insurance interests. Analysis of some 17,000 civil jury trials in Cook County and San Francisco County during 1960-84 led the researchers to conclude: "Punitive damages were rarely awarded in personal injury cases and there is little evidence that frequency has increased significantly. The study also found that most punitive damage awards remained fairly modest." M. Peterson, S. Sarma, M, Shanley, Punitive Damages: Empirical Findings (RAND Institute for Civil Justice 1987). Indeed, they found only six instances of punitive damages awards in product liability cases. The increase in punitive damages has occurred in cases involving business and contract torts, reflecting both the recent development of insurance bad faith law and the fact that "Many punitive

[10]For example, states have accorded their citizens greater protection, particularly against insurance company bad faith, wrongful discharge, and business torts, making punitive damages available to victims who previously had no recourse.

Another explanation may be that there has been an increase in wrongful conduct, an explanation that is at least plausible given the deregulation of broad segments of the American economy.

damages now go to businesses suing other businesses for unfair practices." *Id.*[11]

In the specific area of products liability, an empirical study indicated that punitive damages are so infrequent as to be of "relative insignificance." W. Landes and R. Posner, The Economic Structure of Tort Law 304-06 (1988). The U.S. General Accounting Office found that "Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases," and were likely to be reduced by judicial review. GAO, Product Liability: Verdicts and Case Resolution in Five States 31 & 47 (Sept. 1989).

The most extensive analysis of punitive damage verdicts, covering 47 counties in 11 states, has been completed by Stephen Daniels and Joanne Martin for the American Bar Foundation. They found that:

> Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest. . . . Furthermore, plaintiffs were least likely to be awarded punitive damages in a case involving physical harm -- even if that case involved medical malpractice or products liability.
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> * * *
>
> The punitive damage rates for physical harm cases,

[11]An American Bar Association study examined the Rand data and concluded that:

> contrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation. While punitive damages awards have grown in frequency and size over the past 25 years, the bulk of this growth has been in cases of intentional torts, unfair business practices or contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive.

Report of the Special Committee on Punitive Damages, Punitive Damages: A Constructive Examination 2-1 (ABA 1986).

> including the high visibility areas of medical malpractice and products liability, were extremely low throughout the 19 years [1970-1988]. Furthermore, the typical punitive damage award remained modest.

S. Daniels and J. Martin, Myth and Reality in Punitive Damages, American Bar Foundation Working Paper 44 & 60 (1990), scheduled for publication at 75 Minn. L. Rev. ___ (Oct. 1990).

These findings dramatically refute the mythology urged upon this Court by the tort reformers. None of the researchers found an "explosion" in punitive damages. Indeed, the incidence and increase appears to be smallest in the areas of personal injury and products liability, where the purported jury bias should be most pronounced. Instead, the moderate growth in punitive damages is found in business and contract actions, reflecting expansions in substantive tort law rather than jury arbitrariness. Finally, the relative insignificance of punitive damages in products liability undermines the myth that such verdicts are eroding America's competitiveness.

B. Punitive Damages are Not Harming Innovation and Competitiveness

"There is surprisingly little evidence," states a highly significant study, "that liability currently hinders international competitiveness." P. Reuter, The Economic Consequences of Expanded Corporate Liability 37 (RAND 1988). One reason is that total product liability costs (of which punitive damages are a small fraction) add a relatively small amount to the price of the product -- less than 1% for the vast majority of companies, according to a broad survey of the risk managers of American manufacturers. Weber, *Product Liability: The Corporate Response* 13 (The Conference Board, 1987); Reuter at 45.

More importantly, American companies and their foreign competitors play on a level playing field. Honda,

which makes the largest selling car in the U.S., is subject to the same punitive damage rules applicable to American carmakers. *See, e.g., Dorsey v. Honda Motor Co.*, 673 F.2d 911 (5th Cir. 1982). Potential liability for punitive damages, does not appear to be discouraging foreign manufacturers from competing in the U.S. market. Conversely, American companies selling overseas are subject to the liability laws of the consumer's country. Reuter, *supra*, at 36-37. Studies by various industries themselves generally found no anticompetitive effect from U.S. liability laws. *Id.* at 38-40.

The claim that punitive damages harm innovation and development is also specious. The Pharmaceutical Manufacturers Association ["PMA"], which makes this argument in its amicus brief, points to the example of childhood vaccines, despite the fact that no maker of childhood vaccines has paid a cent in punitive damages.[12]

Punitive damages do not overdeter the development and marketing of beneficial products for the simple reason that they are not imposed for otherwise innocent conduct. They are merely additional damages assessed against one who willfully and wantonly or with conscious indifference engages in conduct which is already unlawful under the substantive law. The overdeterrence argument is properly directed to the state's product liability law itself.

The argument also fails to conform to reality. The fact is that American companies are spending vast sums to develop new medicines. "Companies Search For Next $1 Billion Drug," New York Times, Nov. 28, 1988, at D1. PMA itself announced in a series of advertisements in the

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[12]PMA misleadingly cites as "illustrative" the only jury verdict imposing punitive damages against a vaccine maker, *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). PMA acknowledges that the verdict was overturned on appeal, but argues that the vote was 4-3, apparently finding a due process right not only against deprivation of property, but also against close calls. Brief of PMA at 17-18, n. 50. Similarly, the maker of Bendectin, PMA's other example, has not paid any punitive damages.

national media that research and development by U.S. pharmaceutical firms has "doubled every five years since 1970," and "Nearly half of the new medicines that achieved worldwide acceptance over a 12-year period originated in the United States." The series, "Innovations In Medicine," appeared in The Washington Post, Nov. 17, 1989.

At the very heart of the arguments of Pacific Mutual and the tort reform amici is a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict the reformers' dark and cynical portrait of our civil justice system. Nevertheless, they urge this Court to cast away guiding principles of due process, federalism, and the common law tradition. They offer a rule premised on distrust for judges and juries alike. The myth is wrong. Due process of law finds no higher expression than in the independent civil jury.

CONCLUSION

For these reasons, ATLA urges this Court to affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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